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Hitting the right target: EU and Security Council pursuit of terrorist financing

Abstract: Targeted sanctions originated as a more refined tactic in response to humanitarian concerns over the unintended consequences connected to comprehensive trade embargo sanctions. Extending targeted sanctions to include terrorism produced further unintended consequences, in particular the faulty identification of sanction targets. This paper looks at one specific case of targeted sanctions against the financing of terrorism in order to study the position of the European Union at the United Nations Security Council. The listing of the Somali money transfer firm al Barakaat raised a number of issues involving the use of sanctions against non-state actors. It also provoked a legal challenge against the EU's implementation of these targeted sanctions, which in turn has been portrayed as a challenge to the use of targeted sanctions by the Security Council to maintain international peace and security. This paper considers first the development of targeted sanctions, then EU Presidency statements at the United Nations concerning terrorism followed by a brief summary of the al Barakaat case, which motivated a number of changes in the sanctions process. Following the discussion is an assessment of the damage incurred from the misidentification of al Barakaat as a source of terrorist financing and several concluding thoughts on the location of the EU in the use of sanctions against terrorism. The central point here is the same as that frequently stated by the EU Presidency, that targeted sanctions must ensue from due process and the rule of law, whatever the venue, in order to protect human rights.

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Hitting the right target: EU and Security Council pursuit of terrorist financing

The pursuit of terrorist financing as a topic does not elicit much excitement or enthusiasm, projecting as it does an image of a room full of people wearing green eyeshades bent over ledgers of financial data engaged in ‘forensic accounting’. This image in fact motivated John B. Taylor to title his recent memoirs, *Global Financial Warriors: The Untold Story of International Finance in the Post-9/11 World*.¹ In the preface, Professor Taylor explained that the book is his attempt to fill in the background story concerning the financial aspects of the American global war on terror, and to tell the story of the ‘thousands of well-trained, highly motivated “global financial warriors”.’ (Taylor, 2007: xii) For most people I accept that this is not a very exciting subject, yet it is very much a part of the background to our everyday lives. For some individuals in particular the financial war on terror has become a very important part of their life. In those instances where they have been targeted by UN/EU/US financial sanctions, they discover that their ability to access their bank account has been stripped away and they are prevented from any other form of financial activity entirely. At the same time, when these individuals are not associated with terrorists they have little recourse to correct the misunderstanding or misinformation that leads to a ‘false positive’—the incorrect identification of an association with terrorism and their subsequent mistaken inclusion on a UN financial sanctions list.

The following discussion and analysis considers how these events came about and, specifically, the intervening role of the European Union in the transfer of a United Nations Security Council Resolution directing the imposition of financial sanctions onward to the Member States. Given that the EU does not have a distinct legal personality on the Security Council itself, how is this role accomplished and what are the consequences of this intervention? A recent analysis of ‘The European Powers in the Security Council’ suggests that whatever reasons/desires may lie behind reform of the Security Council, a consolidated European representation in the form of a seat for the EU is unlikely (bringing as it would a loss of power and prestige for Permanent members France and the United Kingdom). Moreover, this would effectively reduce *European* weight within the Security Council, which at present has an elected member or two in addition to these two Permanent members. (Hill, 2006) This assessment is reinforced by an analysis of EU participation in UN Human Rights

forums that suggests speaking with a single voice may actually *reduce* European influence at the United Nations as compared to the influence possible from a chorus of multiple Member States' voices. (Smith, 2006: 133) Nonetheless, multiple voices speaking in chorus remain ineffectual in the context of Security Council decision-making, which is often a product of consensus because of the veto option available to the Permanent Five. Absent any foreseeable reform of the United Nations and Security Council, any analysis of UN sanctions in the financial war on terror must continue to focus on the actions of individual state members in the framework of their various multilateral institutional affiliations.

Back in Brussels, however, the Commission does function at times as if it was a participating member in its own right of the UN when, for example, it implements a Community action in response to a Security Council Resolution. This action is consistent with the exclusive competence of the EC in external trade matters, which includes economic and financial sanctions. The legal precedent confirming this competence is contained in a number of European Court of Justice (ECJ) decisions. (Lavranos, 2006: 473; Ketvel, 2006) The imposition of sanctions by the EU in this fashion has been challenged and for the case of sanctions against the financing of terrorism several of those named in Europe took the Council and the Commission before the Court in protest of the imposition of economic sanctions, asserting that they were innocent of the accusations. Due to the targeted nature of Security Council-mandated sanctions against named persons in these circumstances, the European Union no longer appears to uphold the human rights of its individual citizens. Rather it seems to have become another layer of abstraction between the individual and the external agency infringing those rights. As described by Nikolaos Lavranos, the standard legal relationship in a EU Member State between a UN Resolution and national implementation now has an additional layer of legality inserted, such that the relationship is in the form 'UN sanctions–EC/EU law–national law'. (Lavranos, 2006: 472) The nature of UN sanctions against terrorist financing forced an individual Member State (Sweden) to step around Brussels in order to act directly on behalf of its residents/citizens as well as to lobby for modifications to the Resolution and the methods established to monitor and update the associated sanctions list. (Cramér, 2003) In this relationship, the individual cannot seek legal remedy from the state, because national courts may not act on EU/EC legislation, and the individual has no presence before the Security Council. (Vlcek, 2006: 503 - 504) It is necessary for the state with either a citizenship or residence relationship to the individual to act on their behalf before the Security Council. Independent 'de-listing' procedures for the

UN sanctions lists were formally introduced with Security Council Resolution 1730 (2006), several years after the imposition of sanctions on al Barakaat and its named principals, the specific case from Sweden used in this analysis.

On the global stage, the nature of the Security Council's 'targeted sanctions' structure itself is problematic. But in this context, the institutions of the EU represent more of a hindrance to its citizens because it is not a member of the UN while possessing the means to reprimand/punish Member States for failing to comply with those UN Resolutions that have been transposed into EU policy. To represent their citizens' human rights before the Security Council the EU Member State may place itself in conflict with the Commission (and other member states as the United Kingdom supported the Commission before the Court of First Instance in Case T-306/01 and Case T-316/01). This situation is in marked contrast to the circumstances for the other member states of the United Nations when it comes to compliance with Security Council Resolutions. 'U.N. Security Council Resolutions adopted under Chapter VII of the U.N. Charter (encompassing all sanctions resolutions) are binding on member states, but they are also often observed in the breach, and their language frequently leaves ample room for interpretation.' (Myers, 2002: 17) An important aspect of the efforts to reform UN sanction regimes concerns the problem of national implementation in order to improve global effectiveness and compliance of sanction regimes. Significantly, the UN possesses few, if any, capabilities to punish the non-compliant, whereas the Commission has the option to bring a reluctant EU Member State before the European Court. (de Vries and Hazelzet, 2005: 101)

To accomplish the goals desired from this paper, it is structured in four sections and closes with some concluding remarks concerning the use of targeted sanctions in the war on terror. The next section lays out the use of targeted sanctions as a method of international political control and the application of targeted sanctions against terrorism. Then the paper situates the European Union within the public image of the Security Council, recognising that most Security Council work takes place in private meetings and informal gatherings. The third section introduces the specific case of the financial sanctions imposed by the Security Council on al Barakaat and its named principals as an example of a target for financial sanctions in the war on terror, which was then contested in the European Courts. In the fourth section is an analysis of the reaction to this representative legal challenge and with it the entire structure of 'targeted sanctions'. This will permit some conclusions to be drawn

concerning the consequences that arise from the presence of the EU as a layer of bureaucracy between national governments and the universal international organisations of the United Nations system in the contested equation of liberty versus security.

Targeting sanctions

The subtitle of a 2005 edited collection surveying the contemporary usage of international sanctions captures the essence of the objectives for imposing sanctions — ‘between words and wars in the global system’. (Wallenstein and Staibano, 2005)² The ultimate purpose of a sanction, whether imposed by a single state or by a collection of like-minded states, is to accomplish a foreign policy goal.³ The belief is that sanctions demonstrate a firmness of resolve to force a change in the policies, actions or conduct of another state or its governing elite, but as a demonstration that falls short of using military action to *force* or manufacture the change. Thus, the imposition of economic sanctions by the United Nations against Rhodesia in 1966 in response to the unilateral declaration of independence, an arms embargo against South Africa in 1977 to demonstrate opposition to apartheid and South Africa’s interventions in neighbouring states, and economic sanctions against Iraq following its invasion of Kuwait in 1990. The sanctions against Rhodesia ended with the end of white-minority rule in 1979, the arms embargo against South Africa ceased in 1994 at the end of apartheid while the Iraq sanctions regime continued until 2003, ending only after the forced removal of Saddam Hussein. United Nations-directed sanctions have been used increasingly as a tool for international action by the Security Council since the end of the Cold War. In most cases, sanctions were imposed in an attempt to stop local violence in the Balkans and sub-Saharan Africa. As noted by Carina Staibano’s analysis of ‘Trends in UN Sanctions’ the structure of the sanctions regimes established by the Security Council has evolved since 1990, shifting from comprehensive trade bans to the implementation of targeted sanctions. This shift reflects the difficulties experienced with past attempts to impose a full embargo on trade, while permitting legitimate humanitarian aid to pass through and monitoring for any sanction-busting activity. (Staibano, 2005)

A number of initiatives since the late 1990s have sought to clarify and improve the process as ‘targeted’ sanctions in order to avoid the humanitarian concerns arising from comprehensive trade embargoes. At the same time these initiatives also seek to improve the efficacy of this tool for international peace and security. Three major international initiatives, the Interlaken Process, the Bonn-Berlin Process and the Stockholm Process, have since 1998 looked at

different aspects of targeted sanctions.⁴ The Interlaken Process explored methods to improve the effectiveness of financial sanctions, and one product of this project was a manual for practitioners that provides guidance to those diplomats involved in drafting UN Resolutions containing financial sanctions and a set of 'best practices' to assist in the implementation of financial sanctions.⁵ The German Foreign Office initiated the second project in 1999 as a process to explore ways of improving the interrelated set of sanctions involving travel, aviation and importing weapons. Again, the goals were to improve the content of UN Resolutions drafted to establish these sanctions, implementation procedures at the national level, and the processes used to monitor and verify enforcement. The Stockholm Process built on the work accomplished by its predecessors and sought to identify further methods to improve the implementation of sanctions. Recommendations for improvement covered the breadth of the sanctions regimes, from establishing sanctions at the UN to the state-level procedures used to carry out sanctions and developing tactics to counter any attempts made to evade sanctions.

For the most part, the UN sanctions regimes reviewed by Staibano and the larger set of economic sanctions analysed by Kimberly Ann Elliott concerned states and ruling elites. (Staibano, 2005; Elliot, 2005) Those targeted by sanctions possessed some essential factor that could be successfully subjected to the leverage afforded the international community from this action-short-of-war. Moreover, states, their elites, and populations generally possess a need, or at least a desire, to interact with the larger world beyond their borders and as such are likely to respond to the limitations imposed by a trade embargo or travel ban. The response of the Taliban to the sanctions imposed on that political regime in Afghanistan, however, demonstrated the futility of sanctions when they are simply ignored by the target. In this situation the leverage of sanctions was limited and the state of affairs remained unchanged until the Taliban were forcibly removed from power at the end of 2001. In this instance at least, the move from sanctions to war in the global system was possible as there was a state entity against which the United Nations could take action. The application of economic sanctions against non-state actors on the other hand is more difficult, for what or where do you take direct action when sanctions are determined a failure? This is particularly difficult if the identified individuals are already sought by police agencies for related criminal charges. It is also not as easy to identify a member or associate of a non-state actor to add to a sanctions list as it is with the case for the ruling elites of a state. This problem is made more challenging when the non-state actor in question possesses clandestine characteristics

intended to conceal membership, participation and logistical support from outside observers. Thus the attempts to impose financial sanctions against the individuals and entities associated with Osama bin Laden and the al Qaida network may lead to the inclusion of individuals and entities by mistake. It was such collateral damage in the financial war on terror that has led to the legal challenges against financial sanctions that ultimately, if indirectly, also question the legitimacy of the actions of the Security Council.

A further complication arises from the attempt to deploy economic sanctions against terrorism. With terrorism the sanctions no longer serve as a means to force some policy change by a state but instead represent a directive to states to act in order to prevent a specific activity. The Resolution (1373) following the 11 September 2001 terrorist acts called on states 'to work together urgently to prevent and suppress terrorist acts'. (United Nations Security Council, 2001: 1) It is an attempt to forestall future violence without addressing the underlying motivations that are used to translate the violent act into a political act. This is not the place to debate the 'better/best' approach for dealing with political violence and terrorism. The point raised here is simply to recognise the fundamental difference between economic sanctions imposed on states and non-state actors desiring to become or control states (sanctions that pursue a goal of policy/conduct change) and economic sanctions targeted against non-state actors in order to prevent some indeterminate future action. (Geiss, 2005; Fitzgerald, 2002) The events surrounding one specific attempt at deterring the financing of terrorism through UN sanctions demonstrated the imperfect nature and efficiency of these actions.

On 21 September 2005 the Court of First Instance (CFI) of the Court of Justice of the European Communities released its judgement in the joined cases of Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (Case T-306/01 and Case T-315/01). The specific sanctions challenged before the CFI in case T-306/01 were imposed by Commission Regulation (EC) 2199/2001 with effect from 12 November 2001. The Regulation amended the existing EC Regulation 467/2001 in response to the action of the UN Security Council Sanctions Committee to an update of its sanctions list on 9 November 2001. As discussed below, their addition to the UN sanctions list was made at the request of the United States, which believed that the Somali money transfer firm al Barakaat and its named principals were engaged in the financing of terrorism or otherwise supporting terrorist

groups. At that point in time the Sanctions List identified those persons (natural and legal) targeted by the financial sanctions imposed against the Taliban, al Qaida, and Osama bin Laden (and associates) under the direction of UN Security Council Resolutions 1267 (1999) and 1333 (2000). These two Resolutions were concerned with ‘the situation in Afghanistan’, deplored the use of Afghanistan as a safe haven by bin Laden and demanded that the Taliban turn him over to the appropriate authorities. Security Council Resolution 1267 (1999) imposed a travel ban and financial sanctions against the Taliban, and Resolution 1333 (2000) reiterated the demands of the previous Resolution while extending the sanctions regime to freeze the financial assets of bin Laden, his associates and any entities associated with him, including the al Qaida organisation.⁶ With this short introduction to sanctions, the paper moves in the next section to a search for the location of the European Union at the Security Council in the formulation and maintenance of these Resolutions constructing the financial front of the global war on terror.

The EU and the UNSC

Any attempt to make a claim for EU action at/in the UN Security Council is inherently problematic, first because the EU is not a member. The *European* members of the Security Council find themselves with conflicting interests and desires in the context of decision-making in the pursuit of international peace and security. (Hill, 2006) The second problem is the fact that substantive and critical debate over security issues occur *in camera*, leaving the researcher with hints, innuendo and anonymous tips that may suggest or imply a particular viewpoint or opinion behind any decision or action. And as with the first point, public statements by any individual state member of the Security Council are intended for a multitude of audiences, domestic and international. Consequently, following the methodology suggested by Robert Kissack, the official EU viewpoint will be taken(found) from(in) the public statements made at the UN with respect to the very specific issue of sanctions and the financial war on terror. (Kissack, 2007) As may be seen in the table below, these statements are a subset of a large and varied set of official statements made at the UN by the EU Presidency. (Farrell, 2006: 35)

What we have in this situation is the participation of actors without a presence. By this I mean the subject of a UN targeted sanctions regime is not permitted a presence in the context of UN decision-making practices because these persons (natural or legal) are not recognised in the practices of inter-state organisations. Similarly, the supra-national entity that is the

European Union (Commission and Council) has a transparent existence within the United Nations system. In some instances, the Food and Agriculture Organization for example, the European Community is a recognised member speaking and acting on behalf of its component Member States while they maintain an independent membership. Whereas there are other UN organisations in which the EU possesses less of a presence, participating as an ‘observer’ of events and decisions while its Member States speak and act. And finally, the EU becomes diaphanous in UN organisations such as that under analysis here, the Security Council; present in the meeting room, invited at times to speak, the EU has no official seat, no vote, no substantive influence in the hard political actions involving international peace and security. The voice of the European Union is conveyed formally through the representation of the current holder of the rotating European Presidency. (de Vries and Hazelzet, 2005: 101; Biscop and Drieskens, 2006: 122) Yet even in the context of less contentious issues at the Security Council, such as financial sanctions to deter and suppress terrorist financing, meeting minutes suggest some disagreement amongst the member states. For example, in the press release relating the meeting of the Security Council on 25 May 2004, the Irish representative made a statement on behalf of the European Union. The Security Council that day heard a briefing from the Chair of the 1267 Committee concerning the work of the Committee since its last periodic report. In remarks made following the briefing, the representatives of France, Romania and Germany (in that order) associated or subscribed themselves with the statement to be made on behalf of the European Union. The statement of Spain’s representative was located in the press release prior to these three statements and the statement of the UK’s representative was located after them; however, neither individual found a reason to refer to the EU or the subsequent remarks of Ireland’s representative in their own remarks. (United Nations Security Council, 2004)⁷ The following table provides a count of formal EU statements made at various United Nations bodies located in New York involving terrorism and the sanctions imposed by the Security Council against the Taliban, al Qaida, their associates, etc.

Statements of the European Presidency on behalf of the European Union at the United Nations, New York concerning terrorism from 2000-2006*

United Nations (New York) body	Number of statements over the period that explicitly involved UN action against terrorism
General Assembly	3
Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996 on 'Measures to Eliminate International Terrorism'	12
Third Committee (Social, Humanitarian and Cultural Affairs)	1
Security Council	19
Counter Terrorism Committee	1
Total number of statements concerning terrorism	36

* NB – as of 30 April 2007 there has yet to be an EU statement at the UN involving terrorism in 2007. See <www.europa-eu-un.org>.

What this simple table does not explicitly show was the quantitative shift from statements made to the Ad Hoc Committee in 2000-2002 to the increased incidence of statements made predominately to the Security Council after 2002. These latter statements were connected with the work of the 1267 Committee, Counter Terrorism Committee and their affiliates.⁸ The shift is a reflection of the change occurring in the United Nations' engagement with international terrorism, from the periodic work of the General Assembly's Ad Hoc Committee to produce international conventions against terrorism, to the direct action of the Security Council against specific manifestations of terrorism. Since its creation by the General Assembly the 'Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996' has provided the forum in which to propose, draft, negotiate and refine international conventions against terrorism. These treaties presently include the International Convention for the Suppression of Terrorist Bombings (GA 52/164, 1997), the International Convention for the Suppression of the Financing of Terrorism (GA 54/109, 1999) and the International Convention for the Suppression of Acts of Nuclear Terrorism (GA 59/290, 2005). They reflect what is conceptualised in the statements of the EU as a 'sectoral approach in the negotiation and conclusion of anti-terrorist conventions'. (European Union Presidency, 2004b) Since 2000 the Ad Hoc Committee has been working on a

Comprehensive Convention on International Terrorism, a process that is likely to take several more years before reaching an agreement on a draft convention.

By contrast, the Security Council has moved to take direct action against specifically identified agents and organisations involved in terrorism and the support, financing and incitement of terrorist acts. In 1999, the Security Council passed Resolution 1267 establishing financial sanctions against the Taliban, Osama bin Laden, al Qaida and associates. Subsequent Resolutions have directed member states to strengthen laws against terrorism and the financing of terrorism consistent with the Recommendations of the Financial Action Task Force (FATF) and Best Practices produced by Interpol, the United Nations Office on Drugs and Crime (UNODC), and others.⁹ The modifications made to enhance and clarify the Security Council Resolutions applying economic sanctions were outlined above. In parallel with these additional resolutions are a number of EU statements addressing the human rights concerns and enforcement/compliance issues that the succeeding resolutions sought to correct. Repeatedly noted was the importance of a continued need to respect human rights while fighting terrorism and a reminder that the ‘human rights of individuals should be taken into account in the design and implementation of targeted sanctions’ against terrorism. (European Union Presidency, 2004a; European Union Presidency, 2002; European Union Presidency, 2005) Similarly, EU statements at the United Nations refer to ‘due process’ in the operation of the 1267 Committee and increased transparency in its work practices. (European Union Presidency, 2004a; European Union Presidency, 2003) In order to understand the direct consequences of Security Council meetings and Resolutions, the next section briefly relates the history of the case involving al Barakaat, a Somali diaspora money transfer firm with offices in North America, Europe and the Middle East.

Hitting the wrong target — al Barakaat

There has been a number of cases contesting the actions of the EU/EC and its implementation of UN Security Council Resolutions against the financing of terrorism lodged at the Court of First Instance.¹⁰ The plaintiffs’ legal teams have taken several different approaches to construct their challenge against the imposition of sanctions, however, subsequent to the judgements issued in Cases T-306/01 and T-315/01, the Court has seen fit to refer back to the logic of its decision in these two initial cases (see for example §86 - 91, §103 - 156 in the Judgement for Case T-253/02). Consequently, attention must be given to the Judgements

issued in these cases as effectively setting the judicial precedent. Perhaps more important is the fact that the plaintiffs in T-306/01 were vindicated outside the boundaries of the European Court of Justice in that the accusations made against al Barakaat as a conduit of terrorist financing by the US government were unfounded, as documented by the 9/11 Commission in the *Monograph on Terrorist Financing* appended to the Commission's published report. (Roth et al., 2004)

The Somali firm of al Barakaat has been identified variously as a money-wiring service, a money exchange, and a telecommunications service provider (as part of a diversification/expansion strategy bringing mobile phone service to the residents of Somalia). Prior to the anti-terrorism action directed by the United Nations Security Council, it was one of the largest firms in Somalia. (Kaufman, 2001) The US government announced on 7 November 2001 that under the authority of Presidential Executive Order 13224 (23 September 2001) it was blocking the assets of 67 individuals and organisations associated with al Barakaat and al Taqwa. They were alleged to have links to terrorists, with connections to al Qaida and serving as a conduit of terrorist financing. Al Barakaat in particular was accused of close connections with al Qaida, including the accusation that its initial investment capital has been provided by bin Laden. Government officials in the US accused the firm of collecting money for al Qaida by skimming a percentage from the transaction fees it charged to transfer money. The al Barakaat managers in the US, Canada, Sweden, Dubai and Somalia all denied the accusations that al Barakaat was connected with or supported terrorism. Classified intelligence evidence was cited to justify the order to close the firm and freeze its assets worldwide, as well as for placing specific named individuals and firms on the United Nations sanctions list.¹¹

In the end, none of those connected with al Barakaat in the US were charged with terrorism. The most that officials were able to accomplish with the evidence available was to convict one Somali with operating an unlicensed money transfer firm in Boston, and the two Somalis operating the al Barakaat office near Washington, D.C. pled guilty to one count of 'conspiracy to structure transactions to avoid reporting requirements', which is an anti-money laundering charge. (Jackman, 2002) In the climate of the times and with the desires of government officials to be seen as 'taking action' against terrorism, charges were levelled at al Barakaat without credible evidence. An unnamed government official was quoted in the *New York Times*, 'This is not normally the way we would have done things. ... We needed to

make a splash. We needed to designate now and sort it out later.’ (cited in de Goede, 2003: 523)¹² As already noted, the 9/11 Commission documented the inquiry conducted by the US Federal Bureau of Investigation (FBI) into al Barakaat. The FBI received ‘unparalleled access and support’ from the Central Bank of the United Arab Emirates (UAE) to the bank records they held on al Barakaat accounts with the Emirates Bank International. (Roth et al., 2004: 81) Moreover, they interviewed senior officials of al Barakaat including its founder who was alleged to have had personal contact with bin Laden in the late 1980s. The FBI did not find the anticipated ‘smoking gun’ that would have implicated the firm. ‘Overall, the [lead FBI] agent believed that much of the evidence for al-Barakaat’s terrorist ties rested on unsubstantiated and uncorroborated statements of domestic FBI sources.’ (Roth et al., 2004: 82)¹³

The objective for ‘targeted’ sanctions is to avoid the collateral damage that resulted from broad trade embargoes, nonetheless they may still affect more than simply the parties identified by name on a sanctions list. In this particular case, the customers of al Barakaat were also affected by the firm’s closure in November 2001, with subsequent knock-on effects for the residents of Somalia. Migrant remittances to Somalia substantially exceeded aid to the country (by several factors) in 2001 and 2002. (Omer and El Koury, 2004: 45, Figure 1) As the largest source of foreign currency in the Somali economy, remittances were ‘critical to keeping the Somali economy afloat’ and in the absence of a formal banking sector, money transfer firms like al Barakaat filled this void. In 2001, al Barakaat was the dominant firm in this sector, leading to predictions of a further humanitarian crisis in Somalia as a result of its closure.

“The al-Barakaat closure is having a very, very serious effect,” said Randolph Kent, the United Nations humanitarian representative in Somalia. “We are at a point where we have to start anticipating a crisis that could be unique in the modern state system – the collapse of an entire national economy.” (Kaufman, 2001: A30)

Discounting for journalistic hyperbole one could make the case that the Somali economy had already effectively collapsed and one result was the opportunity for al Barakaat and other money transfer firms to emerge as a critical component of the economy. Even with the closure of al Barakaat’s foreign operations by UN Security Council sanctions the remaining money transfer firms adapted and expanded, ‘averting what would have otherwise been a humanitarian disaster.’ (Omer and El Koury, 2004: 48) The market dominance of al Barakaat unexpectedly had influenced innovation and diversification by the other money

transfer firms and with its departure they proceeded to grow and spread into the vacated space. (Vlcek, 2007)

In Sweden, three individuals and the al Barakaat International Foundation had their bank accounts frozen and all further/future financial activity, such as receiving wages from their employer, were banned. Notwithstanding the establishment of financial controls as directed by the updated UN sanctions list and a related revision to the EU list in November 2001, the Swedish government continued social welfare payments to the affected individuals in keeping with Swedish law. (Cramér, 2003: 91)¹⁴ The subsequent timeline of events in Sweden were outlined by Cramér (2003)—the Swedish government requested evidence from the US demonstrating the connection with terrorism only to find and publicly announce in December 2001 that the material provided did not substantiate the accusations. Sweden first approached the Sanctions Committee to review the inclusion of its citizens on the sanctions list in January 2002, where their removal from the list was blocked by three states, Russia, United Kingdom and United States. The Swedish government continued to press the issue, engaging in bilateral negotiations with the US and, supported by other states, successfully convincing the Sanctions Committee to release publicly a statement that outlined their delisting procedures (formalised in Guidelines for the work of the Sanctions Committee later published in November 2002). Two of the three Swedish citizens were delisted in August 2002 (the third was found by the US government to be uncooperative and it refused to approve his delisting by the Security Council). (Roth et al., 2004: 86; Cramér, 2003: 95)

It was this specific experience with the procedures behind Security Council-directed financial sanctions against terrorism that impelled the Swedish government to promote and underwrite the Stockholm Process in December 2001. At about the same time in December 2001 the three individuals listed by the UN, together with the al Barakaat International Foundation, lodged Case T-306/01 with the Court of First Instance. Furthermore, Cramér noted in his conclusions that Swedish public opinion considered the legitimacy of Security Council decision-making processes to be damaged due to its treatment of these three Swedish citizens. Similarly, the General Counsel to the Swedish Mission at the UN wrote that ‘the very credibility of the United Nations was questioned.’ (Miller, 2003: 48) In fact, a charity was created to support them in their efforts to get their names removed from the sanctions list, an action which is also in violation of UN/EU sanctions and which state prosecutors declined to prosecute because of the large number of small donations received making any prosecution

difficult. (Analytical Support and Sanctions Monitoring Team, 2007: 26; Zagaris, 2002) The combination of legal challenges in Europe and the civil disobedience represented by citizen support for the listed Swedish citizens led to fears amongst other governments and academics that the Security Council sanctions process would be undermined. The disciplinary nature of sanctions requires citizen as well as state support for implementation and enforcement. Formally blocking access to bank accounts does little good if significant support is provided 'cash in hand' by members of the public. (Cooper, 2002)¹⁵

Damage assessment

In assessing the consequences that result, first from the Security Council's attempt to impose preventative sanctions against terrorism and second from the legal challenges made against the EU's implementation of these sanctions several points must be kept in mind. First is the evolving nature of the financial war on terror. The initial Security Council Resolution (1267) did not include provisions to correct mistakes (implying that 'false positives' were not expected or a minor concern), a problem that later was corrected in response to the pressure of Sweden and other states due to the mistake made with al Barakaat. Similarly, the total ban on financial transactions was moderated by provisions outlining humanitarian exceptions, an action that some states had undertaken on their own initiative and continued to do without following the procedures outlined in Security Council Resolution 1452. (United Nations Security Council, 2002; Analytical Support and Sanctions Monitoring Team, 2007: 19) This adjustment was cited by the Court of First Instance in its judgement as demonstrating that the procedures of the Security Council worked, recognising that they required the involvement of the Swedish government to represent the plaintiffs at the Security Council. (Case T-306/01, § 317 - 319)¹⁶ Yet at the same time the Court does not acknowledge that at the instant in time when sanctions were first imposed the work practices of the Security Council 1267 Sanctions Committee did not readily facilitate delisting, a change in work practices to be accomplished subsequent to the delisting of two of the three Swedish Somalis.

Second is the implicit tension between liberty and security, at least amongst the democratic member states of the United Nations. As amply demonstrated by statements such as 'We needed to make a splash', there is an intense desire on the part of governments and their security services to act, and quickly, in order to forestall the future unknown threat to state security. Clearly when it comes to freezing financial assets, time is of the essence to prevent suspects from relocating assets ahead of a designation to impose financial sanctions. At the

same time, evidentiary procedures for listing are substantially less than required for legal action (as evidenced by the paucity of changes against those first accused of financing terrorism) and consequently the protection of civil and legal rights proportionately reduced. Third, the confidential nature of intelligence sources behind the requests for listing seriously constrain/limit the circulation of evidence. When this aspect is combined with the mistake that occurred with the 'false positive' of the al Barakaat case confidence in the evidence concealed behind the veil of sensitive sources for *all* requests declines as well. These issues encourage the efforts to improve the effectiveness of sanctions specifically for use against terrorism and the financing of terrorism, to include improving the quality and comprehensiveness of submissions made to the 1267 Committee for additions to the sanctions list. (Analytical Support and Sanctions Monitoring Team, 2006: 10 - 12)

The UN sanctions reform initiatives discussed above (Interlaken, Bonn-Berlin, and Stockholm Processes) culminated in a White Paper published in March 2006. The project team from the Targeted Sanctions Project of the Watson Institute for International Studies at Brown University emphasised in their opening 'Acknowledgements and Disclaimer' that all participants at the formative January 2006 workshop 'spoke in their individual and not institutional capacity.' (Biersteker and Eckert, 2006: 1) This reminder is useful in that any statements made cannot be attributed to the respective institution as a policy statement or official position. Nonetheless, the institutional environment from which the speaker comes to the meeting frequently remains reflected in their remarks, along with national identity and political persuasion. The purpose behind emphasising the constitutive feature of the contributors is the fact that it persists within the statements (and worldview) subsequently expressed in this document. The Executive Summary expresses the concern that 'recent legal challenges' regarding the sanctions against terrorist financing 'potentially pose significant challenges to the efficacy of targeted sanctions.' (p. 3) Consequently, a goal behind this report's analysis and recommendations for improvements to the sanctions process is to 'reduce the risk of judicial decisions that could complicate efforts to promote international peace and security.' (p. 3) The focus of the White Paper is then to improve the sanctions process in order to prevent judicial constraints on Security Council action against terrorism, rather than to improve the process in order to maintain compliance with human rights norms. It is thus simply another iteration of the 'liberty-security balance' debate, with preferential treatment afforded to the security side.¹⁷

One problem with this iteration of the liberty-security debate, at the international level, is the fact that UN sanctions have been challenged in national courts essentially on only the one point—the human rights of the individual. This tactic obscures the difficulties involved with the imposition of targeted sanctions against a non-state entity versus their application against a state government and local ruling elite. Consequently, what interests us here today is not the question of individual human rights in the context of UN Security Council targeted sanctions against individuals, nor is it the interposition of the European Court of Justice in the Common Foreign and Security Policy (CFSP) of the EU. Those questions have been analysed elsewhere to varying degrees of conclusion. (Ley, 2007; Ketvel, 2006; Lavranos, 2006; Pech, 2006; Tomuschat, 2006; Vlcek, 2006; Tappeiner, 2005; Andersson et al., 2003) Rather the issue at hand is the reaction to the court cases by the various parties that support or criticise the Security Council on its use of targeted sanctions in the war on terror. This reaction involved both a question of United Nations Security Council *obligations* to uphold human rights norms in its activities, initiatives and directives when pursuing international peace and security; and what may be read as indignation at the very idea that a national juridical agent could, even indirectly and obliquely, challenge the decisions of the Security Council on matters of international peace and security. At issue is whether or not anyone occupies a position (or is qualified) to contest the judgement of the Security Council, acting in the best interests of the international community, to identify and condemn threats to international peace and security and to direct its member states to take the necessary measures to isolate and eliminate the threats identified. The specific question here is whether EU actions at the Security Council moderate or ameliorate Security Council initiatives in an effort to forestall future contestations over targeted sanctions in light of the legal challenges that have been made within the EU against them. A definitive answer to this question is not apparent from the public record of EU statements at the Security Council.

The assumption that the Security Council is infallible in its determination of what constitutes a threat to peace and security seems rather presumptuous and tactfully forgets the *politics* behind the process of designating a threat. In a contribution critiquing claims that the Security Council is failing to meet human rights obligations, particularly with regards to targeted sanctions, Jose E. Alvarez insisted that the determination of the extent and range of any human rights obligation rests solely and completely within the bounds of the Security Council itself, as determined and agreed to by the signatories of the UN Charter. (Alvarez, 2003: 125 - 129) He acknowledged that the Security Council's 'actions with respect to

international human rights and international humanitarian law are problematic and selective' while at the same time insisting that to question those actions or to propose corrective measures to them rather serves potentially to 'undermine the legitimacy or effectiveness of one of the few effective tools that we have for responding rapidly to human rights crises as well as for the progressive transformation of the law of human rights.' (Alvarez, 2003: 123)

In this focus on the human rights aspects of the challenges made against the use of targeted sanctions to counter terrorism and the activities of non-state actors, Alvarez appears to lose sight of the fact that the determinations and judgements of the Security Council are political. The case of the Darfur region of Sudan and the mixture in recent years of both UN action and inaction towards the events in Sudan provides an excellent representative example. It may be the case, as argued by Alvarez, that an international organisation does not implicitly acquire the human rights obligations acceded to by its individual constituent members. At the same time he noted that this particular international organisation is otherwise recognised as 'a prime supporter of international human rights.' (Alvarez, 2003: 122)

The actions of the UN Security Council, however, are a consensus product of the political desires of its members, and most importantly of the veto-wielding Permanent Five. The multiplicity of political desires amongst China, France, Russia, United Kingdom and United States to the (not) genocide in Darfur are emblematic of the fact that the designation by the Security Council as a threat to 'international peace and security' occurs only when the Permanent Five reach a consensus agreement to that fact. It is threat-by-consensus and not a decision reached through clear objective criteria that satisfy any form of structured threat assessment of any danger confronting international peace and security. In fact, the designation of terrorism as a threat to *international* peace and security is itself an extension of the original intentions for the Security Council in the United Nations Charter. (Bianchi, 2006: 885 - 892)

Consequently, when there are events or actors that fail to be designated a threat-by-consensus in this fashion, how legitimate can we find any designation made by the Security Council that a specific event or activity represents a threat to international peace and security? In other words, just because the Security Council determined in the heated tense atmosphere of New York City in the aftermath of the al Qaida attack on the World Trade Center that those who finance terrorism are a threat to international peace and security, must we also accept without question the specific designation of any person (natural or legal) to be a financier of terrorism?

Preliminary conclusions

It would be easy to suggest that this study of EU activity in the confines of the Security Council represents yet another case of substantive differences in policy approach between the EU and the US. (Rees, 2006) To take such a view, however, would be far too simplistic for clearly the European states fully support the sanctions. At the same time, a number of Member States are motivated to improve the operation of targeted sanctions as demonstrated by the Interlaken, Bonn-Berlin and Stockholm Processes. This factor suggests a shared belief that targeted sanctions are a useful foreign policy tool, even against the non-state actors engaged in terrorism. Nor is it a matter of a difference in the perceived level of relative concern with human rights norms or humanitarian action as again, these Processes were in part endeavours to establish more humane approaches to the operation of sanctions as a technique operating ‘between words and wars’ than had been the case with broad trade embargoes against an entire state and its population. On the other hand, there were US representatives at the UN that expressed their concern in Security Council meetings that while some states were willing but lacked the capacity to implement and enforce these sanctions regimes, there were other states that were capable yet remained unwilling. Consequently, in 2004 the US representative restated a previous offer that the US stood ‘ready to bring pressure on those member states that are “able but unwilling” in order to ensure our coordinated effort to defeat al-Qaeda proves successful.’ (United States Mission to the United Nations, 2004) Clearly, this offer represents the official government position in a belief that financial sanctions against terrorism are successful in preventing future acts of terrorism. At the same time, it is also an endorsement of the need for comprehensive global financial sanctions in order to be successful, due to the integrated international relationship of national banking systems.

The difficulty with national enforcement is more than simple disregard by some states for the sanction regimes as directed by Security Council Resolutions, particularly in those cases where a state has passed the necessary legislation without providing the budget required to enforce it. There are also cases of partial support, in which sanctions are initially imposed on residents but are not followed through, for example failing to follow the procedures established by Resolution 1452 to permit humanitarian exceptions prior to making domestic exceptions.¹⁸ The latest report from the Analytical Support and Sanctions Monitoring Team related their finding in 2006 that ‘some States bluntly concede that they have unfrozen money ... without submitting petitions to the Committee’ and that this action was in part due to a

belief that the state in question might find itself in violation of its 'national and international human rights obligations'. (Analytical Support and Sanctions Monitoring Team, 2007: 19) The belief on the part of any 'state in question' concerning human rights obligations is more than just a specific concern for the individual welfare of the person listed or their family. It also reflects a concern with the nature of the process that resulted in the listing of the individual and the absence of transparency in that process to observers outside the chambers of the Security Council. (Analytical Support and Sanctions Monitoring Team, 2007: 16 - 17) This concern has been expressed in the statements of the EU Presidency which frequently restate the official view that the sanctions process 'must be firmly based on due process and the rule of law.' (European Union Presidency, 2006)

For 'effective multilateralism' to occur there must be consensus not only on goals and objectives, but also methods and tactics. Foremost amongst these should be due process and rule of law as a foundation for conduct consistent with human rights norms. The approach taken to achieve the goal of international peace and security requires the active support of all participants in the multilateral process and especially so when the threat is subject to disagreements over basic aspects, like the definition of terrorism. The worry that active support is lacking on the part of some developed states in particular against the 'scourge of terrorism' remains embedded in the attitude taken that to question the application/utility of smart sanctions is also to question the ultimate goal for imposing sanctions in the first instance. However, the insistence on due process and rule of law in the practices and procedures of the UN Security Council should be seen as no different from insisting that domestic (national) methods and tactics against terrorism are also subject to due process and the rule of law. The fact that al Barakaat was the wrong target for financial sanctions underscores at the very least the need for due process in evaluating the evidence and assessing its accuracy before proceeding with the addition of any person to the sanctions list.

As demonstrated by the controversies surrounding the case of al Barakaat a change was required in the UN sanctions regime against terrorism and the financing of terrorism. The EU as a political entity did not accomplish the change, but rather it was the active engagement of EU Member States, continuing to operate as independent sovereign states, that brought about improvements. This set of circumstances is quite understandable given that the core institutions of the United Nations, and most especially the Security Council, remain state-oriented. As noted above, the EU Presidency made appropriate statements at the Security

Council, yet those statements did not always receive the public endorsement and support of all the EU members contributing remarks at a Security Council meeting. Confronted by the remote disciplinary conduct of the Security Council against the financing of terrorism, the fundamental issue remains the protection of human rights juxtaposed against the insatiable demands of the fearful seeking security from the unknown terrorist threat.

Endnotes

- ¹ Professor of Economics at Stanford University Taylor served as the Under Secretary for International Affairs in the US Department of the Treasury from 2001 until 2005.
- ² Hans Dahlgren, Sweden's State Secretary of Foreign Affairs described sanctions with this phrase when presenting the results of the Stockholm Process to the Security Council on 25 February 2003. (United Nations Security Council, 2003)
- ³ I have been reminded that sanctions are not one-dimensional and possess two additional functions. Sanctions may be imposed in response to domestic pressure (US sanctions against Cuba for example) and they may be used as 'signalling' in order to demonstrate leadership or to support international standards. (Drezner, 1999: 10 - 18) In the context of the sanctions introduced against the financing of terrorism in 2001, it must be agreed that US initiatives were just as much about signalling action to its domestic audience as it was a means of taking action against terrorism. See for example (Warde, 2007: vii - xi; Taylor, 2007: 6 - 12).
- ⁴ Various reports from these projects are available on-line, including their final reports. For the Interlaken Process see *Targeted Financial Sanctions—A Manual for Design and Implementation: Contributions from the Interlaken Process*, available at <www.smartsanctions.ch>. For the Bonn-Berlin Process see *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'* available at <<http://www.smartsanctions.de>>. And for the Stockholm Process see *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*, available at <<http://www.smartsanctions.se>>.

- ⁵ Thomas J. Biersteker, Sue E. Eckert, and Peter Romaniuk, *Targeted Financial Sanctions: A Manual for Design and Implementation* (Providence, Rhode Island: Watson Institute for International Studies, 2001).
- ⁶ Due to the peculiarities of Security Council Resolutions, the Resolution passed on 28 September 2001 (1373) directly in response to those al Qaida terrorist acts of 11 September 2001 instructed states to combat the financing of terrorism, but it did not establish further sanctions against those believed to be financing terrorism. The previously established process (UN Security Council Resolution 1267 and its Sanctions Monitoring Committee) was maintained.
- ⁷ The complete EU Presidency statement of 25 May 2004 nonetheless contains the standard opening paragraph—‘Mr. President, I have the honour to speak on behalf of the European Union. ...’ implying prior agreement with the statement by the Member States, including Spain and the UK. (European Union Presidency, 2004a)
- ⁸ The UN Security Council has created a number of subsidiary units to manage and monitor the establishment and enforcement of various sanction regimes. In addition to the 1267 Committee responsible for the sanctions connected to Resolution 1267 against al Qaida and the Taliban, there is also the Counter Terrorism Committee (Resolution 1373), the Counter Terrorism Executive Directorate was created in 2004 to assist the Counter Terrorism Committee (Resolution 1535) and the Analytical Support and Sanctions Monitoring Team (Resolution 1526). This latter team was established to assist the 1267 Committee in satisfying its mandate and provides very useful analysis of the entire process of UN sanctions against terrorism.
- ⁹ The Counter Terrorism Committee has established a directory of relevant international standards and best practices ‘for the implementation of Security Council Resolution 1373’, see <<http://www.un.org/sc/ctc/bestpractices.shtml>>
- ¹⁰ Case No. T-306/01 (Abdirisak Aden and three others versus the Council of the European Union and the Commission of the European Communities), OJ C 44, 16 February 2002, p. 27, and OJ C 35, 7 February 2004, p. 19; Case No. T-315/01 (Yassin Abdullah Kadi versus the Council of the European Union and the Commission of the European Communities), OJ C 56, 2 March 2002, p. 16, and OJ C 35, 7 February 2004, p. 19; Case No. T-318/01 (Omar Mohamed Othman versus the Council of the European Union and the Commission of the European Communities), OJ C 68, 16 March 2002, p. 13; Case No. T-

253/02 (Chafiq Ayadi versus the Council of the European Union and the Commission of the European Communities), OJ C 289, 23 November 2002, p. 25; Case No. T-49/04 (Faraj Hassan versus the Council of the European Union and the Commission of the European Communities), OJ C 94, 17 April 2004, p. 52; Case T -135/06 (Al-Bashir Mohammed Al-Faqih versus Council of the European Union), OJ C 165, 15 July 2006, p. 29; Case T -136/06 (Sanabel Relief Agency versus Council of the European Union), OJ C 165, 15 July 2006, p. 30; Case T -137/06 (Ghunia Abdrabba versus Council of the European Union), OJ C 165, 15 July 2006, p. 30; Case T -138/06 (Taher Nasuf versus Council of the European Union), OJ C 165, 15 July 2006, p. 30.

¹¹ Similarly, al Taqwa was accused of providing investment services to Osama bin Laden and al Qaeda. In actuality, the firm consisted of a structure of offshore business companies registered in the Bahamas, Liechtenstein and Switzerland providing Islam-compliant investments. (Milbank and Day, 2001: 1)

¹² Marieke de Goede is citing (Golden, 2002).

¹³ Professor Taylor's recounting of the al Barakaat episode is brief and apparently unaware of the wider consequences of the sanctions. 'When the 9/11 Commission reviewed the Al-Barakaat case two years later, they found that the evidence of ties to al-Qaeda was not as clear-cut as we had thought and I had indicated in my press briefing.' (Taylor, 2007: 22)

¹⁴ Andersson, et. al. (2003) point out that when the Court of First Instance accepted Swedish government assurances that these payments were sufficient to cover the basic needs of the plaintiffs while the legal process was underway, the Court essentially was accepting as well the fact that these payments violated the EC law that was challenged by this court case. (p. 137)

¹⁵ For example, the Analytical Support and Sanctions Monitoring Team reported that Ahmed Ali Yusuf continued to travel internationally while on the sanctions list with the financial support of the 'Solidarity Committee' created in Sweden to provide support to the three listed Swedish Somalis while they contested the UN sanctions against them. This violation of his travel ban only became widely known after his delisting in August 2006. (Analytical Support and Sanctions Monitoring Team, 2007: 25 - 26)

¹⁶ The official US government position is very similar—'It is important to recognise that these delisting actions not only demonstrated an appropriate consideration of the rights of designated parties, but they also validated the effectiveness of designations as a tool in our

overall efforts to combat terrorist financing.’ (United States Mission to the United Nations, 2005)

¹⁷ See for example (Donohue, 2005; Meisels, 2005; Waldron, 2003; Hardin, 2004).

¹⁸ The initial directions provided by Resolution 1267 concerning exceptions simply stated ‘except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need’ (Article 4(b)). Resolution 1452 provides more a detailed and structured approach to exceptions and also was encouraged by the increased concern for human rights observance in the financial sanctions process.

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